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In The

Supreme Court of the United States

October Term, 1979

No. 79-1516

JAMES A. BRIEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, James A. Brien, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on February 26, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto at pages 14a to 41a. The opinion rendered by the District Court for the District of Massachusetts determining petitioner's motion to dismiss the indictment appears in the Appendix hereto at pages 1a to 12a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1980. The jurisdiction of this Court to review the judgment rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the holding of *United States v. Batcheldar*, 442 U.S. 114 (1979), which permits the government to prosecute under either of two overlapping criminal statutes with different penalties, is limited only to the ordinary situation (Fig. 1) where two criminal statutes proscribing different conduct intersect, or

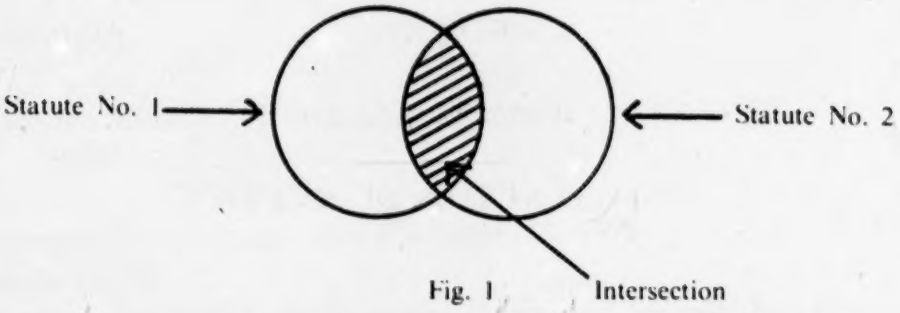

Fig. 1

whether it extends to the special situation (Fig. 2) where a newer criminal statute, with a lesser penalty, is by congressional design a small subset of the other more general statute?

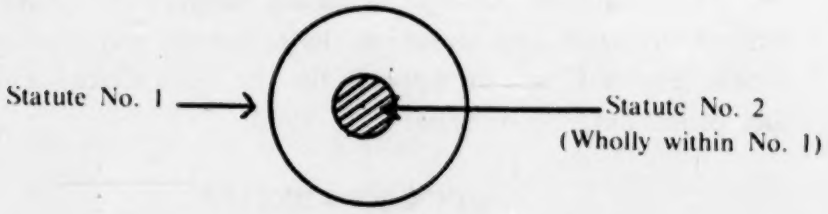

Fig. 2

2. Whether the indictment and conviction of petitioner on charges of having violated general mail and wire fraud statutes (18 U.S.C. §§1341, 1343) in connection with his participation in

the sale of options on commodities was improper because allegations of mail and wire fraud involving commodities trading can properly be brought only under the criminal antifraud provisions of the Commodity Futures Trading Commission Act ("CFTA"), 7 U.S.C. §6o?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 7:

§2:

> ". . . the [Commodities Futures Trading] Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty'), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title: . . ."

§6o(1):

> "(1) It shall be unlawful for any commodity trading advisor or commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or

(B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant."

§13(b) (before 1978 amendment):

"It shall be a felony punishable by a fine of not more than $100,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce."

§13(c) (before 1978 amendment):

"Except as provided in subsections (a), (b), (d), and (e) of this section, it shall be a misdemeanor punishable by a fine of not more than $100,000 or imprisonment for not more than one year, or both, together with the costs of prosecution, for any person to violate any provisions of sections 6-6e, 6h, 6i, 6k, 6m, 6o or 12b of this title, or to fail to evidence any contract mentioned in section 6 of this title by a record in writing as therein required."

United States Code, Title 18:

§1341:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

§1343:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures,

or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE

Preliminary Statement

At stake on this appeal is the scope of an important aspect of prosecutorial discretion regarding the interplay of criminal statutes. This petition raises two issues. The broader and more significant issue is whether the government has the discretion to prosecute under a general criminal statute where the same conduct is proscribed by a more recent statute that Congress specifically intended to apply to a smaller class of cases (otherwise within the general statute) and for which Congress mandated a more lenient penalty. The second issue is whether Congress, in passing the antifraud provisions of the CFTA in 1974 and in imposing a maximum penalty of one year imprisonment, intended them to preclude prosecution for commodities fraud under older general mail and wire fraud statutes with their five-year maximum penalty. The second issue is an application of the first issue to the particular facts of this case.

Only granting the writ now and later reversing the decision below can ensure resolution of these issues. They are issues of first impression, left open by the Court's recent decision in *United States v. Batcheldar,* 442 U.S. 114 (1979), generally approving prosecutorial discretion, and by the decision in *United States v. Maze,* 414 U.S. 395, 404 n. 9 (1974), reserving decision on whether the Truth in Lending Act preempts 18 U.S.C. §1341. The Court in *Batcheldar* and *Maze* was not faced with the precise situation now posed and did not address itself to the distinction now urged. Nor has the interplay of the particular statutes involved here been resolved by the lower courts. Aside from the decisions in this proceeding, research has disclosed no

appellate decision and only one other district court decision on the issue.[1] Now is the time for the Court to put to rest both issues.

Petitioner's argument, which brings into sharp focus the larger issue, consists of a fundamental syllogism:

Major Premise —	Congress intended that criminal violations of the CFTA should be prosecuted under the CFTA only.
Minor Premise —	Petitioner was charged with conduct that violates the CFTA.
Conclusion —	Therefore the indictment under the general mail and wire fraud statute was improper.

Petitioner's syllogism is both good logic and good law. Nonetheless the District Court denied a pretrial motion to dismiss the indictment on these grounds, and the Court of Appeals affirmed the District Court.

Brien petitions this Court to obtain the relief he should have gotten in the first place. Petitioner seeks review of a judgment of the United States Court of Appeals for the First Circuit that affirmed a judgment of the District Court for the District of Massachusetts finding petitioner to be guilty on one count of conspiracy to commit acts of mail and wire fraud in connection with the trading of commodity futures, and on 13 counts of mail and wire fraud allegedly committed in the course of such

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1. The only other decision of which we are aware is *United States v. Bilal*, Dkt. No. 79 Cr. 326 (E.D.N.Y. Oct. 16, 1979), and was handed down after the District Court's decision in this proceeding.

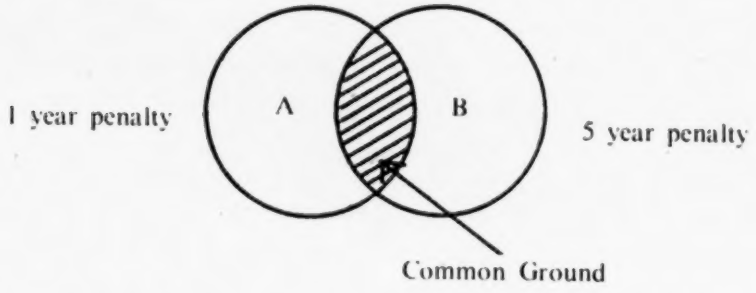
trading. After a five-week trial spanning January and February 1979, and involving five co-defendants, Brien was convicted by a jury in February 1979. The District Court subsequently sentenced Brien to five years imprisonment on each of the counts, each sentence to be served concurrently.

Unless this petition is granted and Brien's conviction reversed, the basic issues of prosecutorial discretion and of the interplay of criminal statutes — that is, *Batcheldar's* operational limits — will remain uncertain and confused. Such fundamental issues for the administration of justice need to be resolved now not later.

The General Theory of Prosecutorial Discretion: Intersecting Circles

Less than a year ago, the Court held that in the usual situation, "when an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants." *United States v. Batcheldar*, 442 U.S. 114 (1979). Mere disparity in penalties alone fails to alter this conclusion. *Id.* The rule announced in *Batcheldar* covers the ordinary, common case of a prosecutor faced with a choice of two criminal statutes covering the same conduct. In the garden variety discretionary situation, a prosecutor comes on a suspect whose conduct violates more than one statute. The statutes are aimed at totally different crimes, but the laws intersect so that there is a common area where one act can transgress two laws.

A simple Venn diagram may help clarify the point. The general theory can be represented by the intersection of two circles, each one symbolizing a different criminal statute with different penalties:

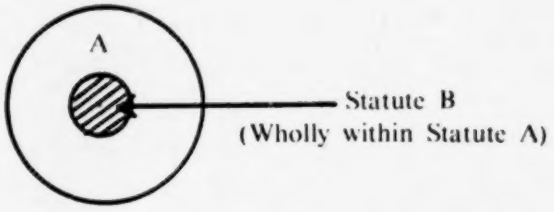


For conduct within the intersecting area, the prosecutor has a choice of either statute A or B, and we cannot fault the prosecutor for choosing the one with the more severe penalty. These are the facts embraced by *Batcheldar,* though *Bacheldar* does not distinguish between this general theory and a special theory.

The Special Theory of Prosecutorial Discretion: Concentric Circles

Although the intersecting circles of the general theory may accurately cover most of the instances of prosecutorial discretion, instances exist where the general theory breaks down. Suppose there is an old broad criminal statute prohibiting a certain type of conduct in catch-all fashion. Further suppose that the legislature passes a new law dealing with a discrete subclass of conduct within the purview of the old catch-all statute. In enacting this new law, assume the legislature intends it, for whatever reasons the legislature deems appropriate, to be the sole statute for prosecuting conduct that it prohibits and even imposes a penalty less severe than that imposed by the old broad law. In this situation, the model based on intersecting circles is inappropriate.

Here the more apt model is one using concentric circles. The larger ring stands for the broader criminal statute with the more severe penalty.



The smaller, interior circle represents conduct prohibited by the newer more precise law with the more lenient penalties, the law that the legislature designed to cover the specific conduct it deals with. Because the conduct covered by the new statute is totally subsumed within the older general statute, the area of intersection is complete. This special situation calls for careful treatment in view of *Batcheldar.*

The *Batcheldar* rule fits the general theory but not the special theory of prosecutorial discretion. The rationale of *Batcheldar* makes sense, and is respectful of legislative intent and the interests of justice, in the context of intersecting circles. It loses its force, however, when applied woodenly to the model of concentric circles. In dealing with the rare special situation, it is more discriminating to abandon *Batcheldar* and heed what the legislature intended. *Batcheldar* should be confined to the general theory; it should not be extended to the special theory.

The conceptual distinction between the general and special theory is crucial and finds support in precedent. Military law has what is known as the General Articles. Those statutes, Articles 133 and 134 of the Uniform Code of Military Justice, are sweeping in scope; they prohibit "conduct unbecoming an officer and a gentlemen," "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." 10 U.S.C.

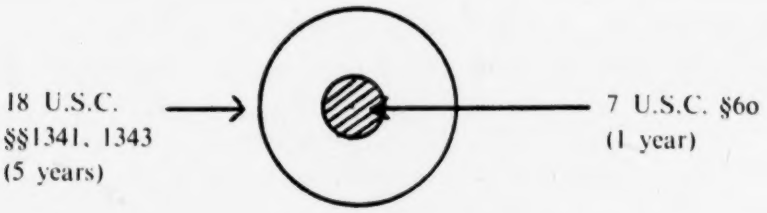
§§933, 934. Although the Court held in *Parker v. Levy*, 417 U.S. 733 (1974), that the General Articles were not unconstitutionally vague, no one would deny their catch-all nature. For this reason, the United States Court of Military Appeals has established a doctrine of preemption for them. Under that doctrine, no conduct may be charged as a violation of the General Articles if it can be charged as a violation of a more specific punitive article. *United States v. Hale*, 20 U.S.C.M.A. 150, 42 C.M.R. 342 (1970) (Article 133); *United States v. McCormick*, 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960) (Article 134).

The doctrine recognized by military law is valid. The distinction on which it is based points the way not to reversing *Batchelder*, but to fine-tuning and delimiting it. It requires, in an appropriate case and depending on legislative intent, that a prosecutor choose the more specific criminal statute, regardless of its penalty. Furthermore, the distinction between the general and special theories of prosecutorial discretion facilitates understanding the relationship between the statutes in this case.

Interplay of Statutes in this Case

This case is an example of the special theory of prosecutorial discretion where concentric circles, not intersecting circles, are appropriate. All of the charges in the indictment relate to commodities fraud. If proven, petitioner's conduct would violate both the general mail and wire fraud statutes (18 U.S.C. §§1341 and 1343), as well as certain antifraud provisions of the CFTA. 7 U.S.C. §6o. Indeed, the Court of Appeals assumed as much, albeit the assumption was made "*arguendo.*"

Fraud in the sale of trading of commodities futures, which is prohibited by 7 U.S.C. §6o, is a subset of the general category of conduct covered by the mail and wire fraud statutes. In this case, the outer ring is



made up of the general mail and wire fraud statutes; the inner ring is composed of the CFTA antifraud provision. Only concentric circles will do here. Intersecting circles are out of place because the general mail and wire fraud statutes totally subsume the conduct covered by 7 U.S.C. §6o.

In addition to an analysis based on scope of coverage alone, other factors reinforce the conclusion that this case is an instance of the special theory. Legislative intent behind the CFTA confirms the conclusion. The CFTA was a new statute passed in 1974 and designed to establish a uniform national policy dealing with commodities. Its antifraud provisions had at that time penalties different from those for general mail and wire fraud. In such circumstances, use of the special theory should

have required the prosecutor to have charged Brien under the CFTA, not the general mail and wire fraud statutes under which he was in fact charged.

The District Court Decision

In September 1978 Brien moved to dismiss the indictment on the ground that if he was to be charged at all with fraud in connection with commodities, then he must be charged under the criminal provisions of the CFTA, not under the general mail and wire fraud statutes. The District Court denied the motion and later refused to reconsider its decision. Although the District Court described Brien's argument as "clever" and "creative," it gave two reasons for rejecting the argument. First, the District Court held that 18 U.S.C. §§1341, 1343 and the criminal provisions of the CFTA can exist together, "side by side," relying on cases interpreting non-exclusive securities statutes. The second reason given by the District Court was that the acts charged "do not appear to constitute violations of" the CFTA, but this second reason was rejected by the Court of Appeals.[2]

The Court of Appeals Decision

Although the Court of Appeals disagreed with the District Court's second reason, it still affirmed Brien's conviction. In the

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2. The flaw in the second part of the District Court's reasoning is its insistence that a violation of the CFTA include an allegation "that the defendants mailed or wired reports containing misleading crop or market information or conditions affecting commodity prices." The District Court simply misread the CFTA. Such an allegation is not required to allege commodities fraud under the CFTA, as a glance at 7 U.S.C. §6o(1) quickly shows. Apparently the source of the District Court's error was its incorrect reading of 7 U.S.C. §13(b), which lists felonies relating to price manipulation under the CFTA, as an exclusive list of criminal conduct. The District Court overlooked §13(c), which made all other violations of §6, including the mail and wire fraud provisions of §6o, misdemeanors regardless of any relationship to price manipulation.

course of its 28-page opinion, the Court of Appeals characterized Brien's argument as urging that his conviction should be set aside because

> "the general mail and wire fraud statutes under which the convictions were obtained were either preempted or impliedly repealed by the enactment of the more specific antifraud provisions of the Commodities Futures Trading Act."

The First Circuit agreed with Brien that it was error[3] for the District Court to have "failed . . . to consider whether the acts [alleged in the indictment] violated 7 U.S.C. §6o, the more pertinent provision of the CFTA." It also said, "we agree that Congress intended the CFTC to occupy the entire field of commodities futures regulation." No appellate precedent directly on point was cited by the Court of Appeals.

The Court of Appeals, like the District Court, gave two reasons for its decision. First the Court of Appeals found no basis for concluding that the general mail and wire fraud statutes were preempted by 7 U.S.C. §6o. The second ground for decision was the "strong judicial policy disfavoring the implied repeal of statutes." The Court of Appeals concluded that the statutes "operate independently and harmoniously" and, citing *Batcheldar*, that the government's decision to prosecute under the statute with the more severe penalty was a permissible exercise of prosecutorial discretion.

Inasmuch as the Court of Appeals accepted *arguendo* the minor premise of Brien's argument — that the indictment alleged violations of 7 U.S.C. §6o — the crucial question is whether the government rightfully could choose to ignore 7 U.S.C. §6o and prosecute under 18 U.S.C. §§1341, 1343. To

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3. The court added that, "In light of our other conclusions in regard to the issues of preemption and implied repeal, we find this to be harmless error."

answer this question, the Court of Appeals should have examined the legislative intent behind the CFTA. It failed to do so.[4] Yet that legislative intent is the best evidence of whether or not prosecutorial discretion is permissible. Moreover, the Court of Appeals totally failed to appreciate that the CFTA carves out specific and discrete areas of fraud as violations and creates a subclass within the larger class of general mail and wire fraud. Thus the Court of Appeals neglected to consider and address the critical distinction between the general and special theories of prosecutorial discretion.

REASONS FOR GRANTING THE WRIT

This case is important because it raises a basic issue involving the administration of justice that needs to be resolved now. As a consequence of the Court's recent decision in *Batcheldar*, there is uncertainty and doubt about the limits to a prosecutor's discretion in charging a defendant under either of two criminal statutes. Language in *Batcheldar* can be read to give a prosecutor unfettered discretion under all circumstances, a result without foundation outside the general type of case involving overlapping statutes.

Now is the time to refine the scope of *Batcheldar*, lest that decision breed unintended confusion. Precisely because *Batcheldar* is such a recent precedent, its language and holding are significant in the current administration of criminal justice. Prosecutors, defendants and courts look to that language for guidance and direction. If it is overbroad or fails to take account of the crucial conceptual distinction between the general and special situations, then those defects will become embedded in our system of jurisprudence. The time to make the correction is now, before the blurring of basic distinctions takes root and becomes appreciably more difficult to undo.

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4. In this respect, the Court of Appeals followed the District Court's summary treatment of Brien's motion, "without yielding to the temptation to delve deeply into the interplay between the commodities fraud, securities fraud, and mail and wire fraud statutes. . . ."

The consequences of allowing the opinion below to stand are unacceptable, not only to petitioner, but to the sound administration of criminal justice. If unreviewed, the decision below will be the only appellate decision on the books on the precise issue presented and will, in all likelihood, influence the future course of the administration of criminal justice. If unreviewed, an unjustifiable and unintended extension of prosecutorial discretion will be sanctioned. If unreviewed, the decision below will help perpetuate a conceptually incorrect method of resolving the interplay between criminal statutes at the expense of congressional intent. Review by this Court can avoid such harm, and, by refining *Batcheldar*, point doctrine in a new direction either by reversing the decision below or at least by establishing a uniform standard for such situations.

I.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT, BUT SHOULD BE, SETTLED BY THIS COURT.

Although the court below did not explicitly say so, its treatment of the issue fairly shows that it was a case of first impression with respect to the particular statutes involved. The court below cited no authority directly involving the interplay of the federal general mail and wire fraud statutes, on the one hand, and the antifraud provisions of the CFTA, on the other. The decision in this proceeding was the first such judicial treatment. Instead of the precedent "on all fours," the Court of Appeals drew on what it thought were analogous precedents and general doctrine regarding preemption, implied repealer, and prosecutorial discretion.[5] Significantly, the court omitted any

5. "Preemption," "implied repealer," and "prosecutorial discretion" are of course buzz words freighted with meaning that may inhibit analysis. It is more enlightening to avoid use of such words and focus on what is actually happening or being urged.

searching analysis of either the congressional intent behind the CFTA or the scope of the *Batcheldar* rule.

A. The CFTA

The central question in determining whether petitioner should only have been prosecuted under the CFTA is Congress' intent in enacting that the criminal provisions of the statute. Yet the Court of Appeals made no serious effort to discern that intent. It merely quoted the text of Section 2(a)(1) of CFTA, which gives the CFTC "exclusive jurisdiction" over commodity futures, and observed without comment that petitioner also relied on certain legislative history. It concluded that "Congress intended the CFTC to occupy the entire field of commodities futures regulation," but found that conclusion to be "of little help" to petitioner. A more faithful study of congressional intent bears different fruit.

Here Congress used straightforward and unambiguous language. The precise words chosen by Congress in 1974 when it passed the CFTC Act were "exclusive jurisdiction" not "concurrent jurisdiction." The CFTA itself prohibits and criminalizes fraud in the commodities field. Thus, 7 U.S.C. §6o(1) prohibits such fraud, and 7 U.S.C. §13 makes such fraud a crime enforceable by the CFTC. The statute, as it read prior to October 1, 1978, classified violations of the mail and wire fraud provisions of Section 6o, regardless of their relationship to price manipulation, as misdemeanors punishable by a fine of up to $10,000 or imprisonment for not more than one year, or both.[6]

The structure of the CFTA also indicates that Congress intended that violations of the CFTA should be criminally

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6. Amendments made by the Futures Trading Act of 1978, Pub. L. 95-405, increased the penalty for mail and wire fraud of any kind in connection with commodities trading [*i.e.*, knowing violation of the provisions of Section 6o(1)] to a felony punishable under 7 U.S.C. §13(b) by a fine of not more than $500,000, or imprisonment for not more than five years, or both.

prosecuted under the CFTA and the CFTA alone. The CFTC regulatory framework, as conceived by the CFTA, is so far-reaching and all embracing that the Second Circuit recently said:

> "In the 1974 Amendments to the [Commodity Exchange] Act, 7 U.S.C. §1 *et seq.*, Congress established the Commodities Futures Trading Commission and set up a comprehensive scheme for regulation of trading in commodity futures."

CFTC v. British American Commodity Options Corp., 560 F.2d 135, 138 (2d Cir. 1977), *cert. denied*, 438 U.S. 905 (1978). Within that "comprehensive" CFTA framework, the Commission has broad authority to promulgate rules and regulations governing commodities futures transactions. 7 U.S.C. §12a(5). Acting under this general rule-making authority, the CFTC has in fact issued many detailed rules covering every aspect of commodities futures trading, *see* 17 C.F.R. §1.0-180.6, including fraud. Even on a cursory glance, the regulatory scheme designed by Congress in its passage of the CFTC Act seems to be "so pervasive as to make reasonable the inference that"[7] Congress left no room for criminal prosecution under other statutes for conduct that violates the CFTC Act. The "balance, completeness and structural integrity"[8] of the CFTA are inconsistent with the suggestion that the CFTA and the Commission it created were designed merely to supplement other already available relief for commodities fraud.

The legislative history of the CFTA shows it was designed to establish uniform national standards for commodities trading. The exclusive jurisdiction conferred upon the CFTC in 7 U.S.C.

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7. *Cf. Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956) (state sedition act held pre-empted by federal Smith Act).

8. *Brown v. General Services Administration*, 425 U.S. 280, 832 (1976) (§717 of Title VII provides exclusive remedy for employment discrimination claims of those federal employees that it covers).

§2 of the CFTA was the cornerstone of Congress' plans to regulate the commodities field,[9] intended to end "confusion in court" from differing regulatory jurisdictions.[10] The CFTC's exclusive jurisdiction "supersedes State as well as Federal agencies."[11] It "would preempt the field insofar as futures regulation is concerned."[12]

In 1978 Congress reaffirmed that "the basic conclusion reached in 1974 that there should be a single regulatory agency responsible for futures trading is as valid now as it was then." S. Rep. No. 95-850, 95th Cong. 2d Sess. 22 (1978). The House Committee concluded "that the Commission should continue to have sole authority for the creation of a nationally uniform body of standards governing activities relating to commodities futures trading." H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 15 (1978). For its part, the Senate Committee explained why preemption is required:

> "The vesting of jurisdiction to regulate commodity futures trading in more than one agency would only lead to costly duplication and possible conflict of regulation or over-regulation."

S. Rep. No. 95-850, *supra* at 23. Precisely the same thing may be said of the government's prosecution of commodities fraud via

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9. The CFTA "has become, therefore, a bold experiment in whether the regulation of an American industry can be conducted more efficiently and more uniformly under a centralized leadership." Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vanderbilt L. Rev. 1, 42-43 (1976).

10. House Comm. on Agriculture, Report on H.R. 13113, H.R. Rep. No. 93-975, 93d Cong. 2d Sess. 2 at 48 (1974).

11. Senate Comm. on Agriculture & Forestry, Report on H.R. 13113, S. Rep. No. 93-1131, 93d Cong. 2d Sess. 23 (1974).

12. Conference Report on H.R. 13113, H.R. Rep. No. 1383, 93d Cong. 2d Sess. 8 at 35 (1974).

general mail and wire fraud statutes rather than the CFTA. The end results -- "costly duplication and possible conflict of regulation or over-regulation" -- are identical and equally to be avoided.[13]

By agreeing that the CFTC was intended to "occupy the entire field of commodities futures regulation," and then rejecting petitioner's argument, the Court of Appeals engaged in a *non sequitur*. Regulation is no less regulation because it takes the form of criminal prosecution.

B. Prosecutorial Discretion

Despite the evidence of congressional intent, the court below held that *Batcheldar* permitted the government to exercise prosecutorial discretion and charge petitioner not under the CFTA antifraud provisions, but under the general mail and wire fraud statutes. The Court of Appeals did not perceive the conceptual distinction between intersecting and concentric statutes.[14] But the special features of the CFTA make it inappropriate in this case to rely on the ordinary discretion of a prosecutor to decide what charges to file. Here the CFTA carves out specific and discrete areas of fraud as violations; it creates a

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13. A perfect example of such conflict is the disparity in punishment. Under the CFTA, Brien could have been sentenced to imprisonment for no more than a year, whereas he in fact was sentenced to five years under the general mail and wire fraud statutes. Of course, mere disparity in penalties alone does not establish an implied repealer. But given the legislative intent to provide for criminal prosecution solely under the CFTA, the penalty disparity becomes an important piece of evidence reflecting that intent. Indeed the 1978 amendment eliminating that disparity in penalty underscores the conscious choice Congress made in 1974 and in 1978 in setting a penalty that it thought appropriate.

14. But the court did say, in an odd twist to petitioner's concentric statute argument, that "for a later-enacted statute to impliedly repeal an earlier one, the later statute must cover the entire field occupied by the earlier one." But such a proposition is grounded in neither logic nor common sense.

subclass within the larger class of general mail and wire fraud. Congress has stepped into the picture, overriding prosecutorial discretion by making the CFTA the exclusive law in the commodities field. Unimpaired effectiveness can be given to the plan put together by Congress in the CFTA by holding that a criminal violation of the CFTA can only be prosecuted under the CFTA and cannot be the basis for a criminal prosecution under 18 U.S.C. §§1341, 1343. *See Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 336 (1979) [42 U.S.C. §1985(c) may not be invoked to redress violations of Title VII of Civil Rights Act of 1964].

The case law cited by the Court of Appeals is inapposite. *Edwards v. United States*, 312 U.S. 473 (1941), which held that the Securities Act does not operate as an implied repeal of the mail fraud statutes, is distinguishable because it does not involve a statute conferring "exclusive jurisdiction." *Edwards* involved the fraud provision of the Securities Act of 1933, an act that does not provide for, and has never been construed as conferring, exclusive jurisdiction on the SEC. Because the Securities Act makes no claim to providing exclusive remedies, the Court held that the Act's fraud provisions could be read side-by-side with more generalized fraud provisions existing in other federal statutes. Such peaceful co-existence of statutes cannot apply to the provisions of the CFTA without stripping it and the agency it created, the CFTC, of the congressionally conferred exclusive jurisdiction over the commodities field.[15] Exclusivity, by definition, cannot be shared.

Similarly, none of the other lower court cases upholding indictments containing counts under both the general mail fraud statute and more specific fraud statutes dealt with "exclusive"

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15. In passing the CFTA, Congress explicitly rejected the model of the federal securities laws, which of course it had before it. Rather than designating more than one appropriate agency, Congress instead created one agency with exclusive jurisdiction and enacted a comprehensive criminal code dealing with commodities. Nothing comparable exists for the securities laws.

statutes.[16] Indeed this Court expressly reserved decision in one such case. In *United States v. Maze*, 414 U.S. 395, 409 at n. 9 (1974), the Court specifically refused to consider whether the Truth in Lending Act preempted the general mail fraud statute. The issues raised by this petition are therefore not foreclosed by decisions of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Daniel J. Kornstein
Attorney for Petitioner

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16. *See, e.g., Bozel v. Hudspeth*, 126 F.2d 585 (10th Cir. 1942) (Federal Trade Commission Act); *United States v. Green*, 494 F.2d 820 (5th Cir. 1974) (Truth in Lending Act); *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975) (Jenkins Act); *United States v. Pocono Int'l Corp.*, 378 F. Supp. 1265 (S.D.N.Y. 1974) (Land Sales Act).

APPENDIX

DISTRICT COURT'S MEMORANDUM OPINION — DECEMBER 29, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 78-327-F

UNITED STATES OF AMERICA

v.

ALAN HERBERT ABRAHAMS, a/k/a James A. Carr, JAMES A. BRIEN, JOHN J. COSULICH, THOMAS LABUS, ROBERT RALPH ZOLLA, MICHAEL SHUSTER, CURTIS BECK, IRA TODD KLEIN, FRANCIS R.H. NICHOLS, CHARLES ANDERSON WATHEN, FRANK POST and STEPHEN BUZZI

FREEDMAN, D.J.

Alan Herbert Abrahams, a/k/a James A. Carr, and eleven others are named as defendants in a fifty-count indictment returned on August 3, 1978 by a federal grand jury sitting in Boston. The indictment focuses on the operations of Lloyd, Carr & Company ("Lloyd, Carr"), a now defunct commodity futures and options firm with which all of the defendants were associated in some capacity. Count One of the indictment charges all defendants with conspiracy to commit acts of mail and wire fraud.[1] The remaining counts charge the defendants, in various combinations, with substantive acts of mail and wire

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1. 18 U.S.C. §371 is the general federal conspiracy statute under which the defendants are charged.

fraud.[2] Since arraignment, two of the defendants have changed their pleas to guilty.[3] At this time, the Court has before it motions for severance, change of venue and dismissal filed by the remaining defendants.

The Severance Motions

The defendants[4] each argue that their joinder in the same indictment is prejudicial.[5] After weighing the benefits to the Court, the Government and the public against the possibility of prejudice to the defendants, *e.g., King v. United States,* 355 F.2d 700 at 703 (1st Cir. 1966), I have decided to sever defendant Abrahams from the other defendants and to deny the severance motions in all other respects.

My decision to sever Abrahams rests primarily upon the comparative uniqueness of his role in the alleged conspiracy and

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2. More specifically, the defendants are accused of violations of 18 U.S.C. §1341 which prohibits mail fraud, 18 U.S.C. §1342 which prohibits the use of fictitious names or addresses in connection with mail fraud, and 18 U.S.C. §1343 which prohibits fraud by wire, radio or television.

3. The two are: Ira Todd Klein and Charles Anderson Wathen.

4. Defendants Abrahams, Brien, Cosulich, Labus, Zolla, Shuster, Beck and Post filed motions for severance in which defendant Buzzi joined. The severance motions were heard, together with the motions for change of venue, on November 22, 1978.

5. Federal Rule of Criminal Procedure 8(b) permits the joinder of two or more defendants in the same indictment provided that ". . . they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Federal Rule of Criminal Procedure 14 permits a severance of defendants where it appears that a defendant is prejudiced by such joinder. But, where defendants are properly joined under Rule 8(b), as they are in this case, a Rule 14 motion for severance is addressed to the discretion of the district court and the defendant bears the burden of making a strong showing of prejudice. *E.g., United States v. Smolar,* 557 F.2d 13 at 21 (1st Cir.), *cert. denied,* 434 U.S. 866, 966, 971 (1977).

the apparent irreconcilable conflict between his right to a fair trial and the theory of the case likely to be relied upon by the other defendants. Abrahams was the linchpin of the alleged conspiracy.[6] The indictment suggests that he created Lloyd, Carr, brought the other defendants into the firm, and directed its operations. In an attempt to dispute the Government's allegations that their participation was knowing and intelligent, the other defendants are likely to offer evidence tending to show that they acted in good faith,[7] relying on Abrahams' registration with the Commodity Futures Trading Commission and his generally solid reputation in the commodities business, and that they had no knowledge of Abrahams' true identity or prior criminal background during their tenure at Lloyd, Carr. The introduction of evidence of Abrahams' prior criminal background would be highly prejudicial to him; exclusion of such evidence might be prejudicial to the other defendants.

Without Abrahams, the possibility of prejudice from trial together of the remaining defendants is too remote to justify further severance.[8] The likelihood that the Government will introduce at trial prior statements or other evidence against some defendants that will be prejudicial to others is counterbalanced by sufficient rules of exclusion[9] and

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6. I note that only Abrahams is named in all fifty counts of the indictment.

7. It appears that good faith, in the sense of lack of intent to defraud, is a defense to charges of mail or wire fraud under 18 U.S.C. §§1341, 1343. *See, e.g., United States v. Klein*, 515 F.2d 751 (3rd Cir. 1975); *United States v. Sheiner*, 273 F. Supp. 977 (S.D. N.Y. 1967), *affirmed* 410 F.2d 337 (2d Cir.), *cert. denied*, 396 U.S. 825, 859 (1969).

8. I note, however, that a trial court has a "...continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Shaffer v. United States*, 362 U.S. 511, 516 (1960). *See United States v. Mardian*, 546 F.2d 973 at 979 (D.C. Cir. 1976).

9. *E.g., Bruton v. United States*, 391 U.S. 123 (1968) (evidence of a confession by a codefendant implicating another may not constitutionally be

(Cont'd)

requirements for admissibility[10] to protect the defendants at trial. Also, no defendant has informed the Court what evidence the Government might offer against some codefendants which would be unduly prejudicial to others. Speculation is not a grounds for severance. *Cf. United States v. Jackson*, 549 F.2d 517 at 524 (8th Cir.), *cert. denied*, 430 U.S. 985 (1977). Similarly, there is an absence here of a showing that exculpatory testimony would be available if the defendants were tried separately. The bald assertion that joint trial will preclude such testimony is insufficient to support a severance. *See United States v. Smolar*, 557 F.2d 13 at 21 (1st Cir.), *cert. denied*, 434 U.S. 866, 966, 971 (1977). *See also, United States v. Wafford*, 562 F.2d 582 at 586 (8th Cir. 1977), *cert. denied*, 435 U.S. 916 (1978). Nor will the possibility of disproportionate evidence or conviction based merely upon association justify severance in this case. *See United States v. Smolar, supra*, 557 F.2d at 21; *United States v. Alpern*, 564 F.2d 755 at 758 (7th Cir. 1977). "[T]he proper inquiry is whether the evidence is such that the jury cannot be expected to 'compartmentalize' it and then consider it for its proper purposes." *United States v. Dansker*, 537 F.2d 40 at 62 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Nothing before me indicates that a well instructed jury will be unable to consider the evidence "for its proper purposes."

The Venue Motions

I turn now to the defendants'[11] motions for change of venue

(Cont'd)

introduced at joint trial). *See United States v. Cleveland*, No. 78-1110 (1st Cir. Oct. 28, 1978).

10. *E.g., United States v. Martorano*, 557 F.2d 1 at 11, *reh. denied*, 516 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978) (statement of co-conspirator in furtherance of conspiracy admissible only after determination that declarant and defendant were members of same conspiracy at time statement made). See Fed. R. Evid. 801(d)(2)(E).

11. Defendants Abrahams, Brien, Cosulich, Labus, Zolla, Shuster and Post filed motions for change of venue in which defendant Buzzi joined.

which are based upon prejudicial pre-trial publicity.[12] Because of my conclusion that Abrahams must be tried separately and because Chief Judge Caffrey of this District determined as recently as July of 1978, in another matter, that Abrahams could not receive a fair trial in the Northeastern section of the United States, *United States v. Abrahams*, 453 F. Supp. 749 at 753 (D. Mass. 1978), I consider Abrahams' venue motion first.

In July, Judge Caffrey granted Abrahams' motion for change of venue in a case charging him with making unsworn false statements concerning his identity and background to a United States Magistrate during a removal and bail proceeding in violation of 18 U.S.C. §1001. Applying the standards enunciated in *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); and *Patriarca v. United States*, 402 F.2d 314 (1st Cir. 1968), *cert. denied*, 393 U.S. 1022 (1969), Judge Caffrey stated that:

> . . . the extensive pretrial publicity in all Boston media -- with respect to the allegedly unlawful behavior of the defendant and Lloyd, Carr & Co., defendant's prior convictions, and the other charges pending against him -- has created in the District of Massachusetts an atmosphere of pervasive community prejudice so inflammatory as to substantially reduce the reasonable likelihood of Abrahams obtaining a fair trial

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12. Federal Rule of Criminal Procedure 21(a) provides:

(a) For Prejudice in the District. The Court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

> before a panel of impartial jurors anywhere in this District. I also find that the media, in the exercise of First Amendment rights which are not questioned by this Court, *see, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 547-70, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), have made it impossible for Abrahams to receive a fair trial anywhere in Massachusetts, the rest of New England, or the Northeastern section of the United States, including New York, New Jersey, or Pennsylvania.

United States v. Abrahams, supra, 453 F. Supp. at 753. The record before Judge Caffrey included a "voluminous collection of newspaper articles," *id.* at 751, which "paint[ed] a black and bleak picture of Mr. Abrahams," *id.* at 752. That same collection is before me today as part of the record, supplemented by articles which have appeared since Judge Caffrey's decision.

In light of the collection of articles before Judge Caffrey, which collection is now before me, his findings, which I adopt, and the more recent publicity concerning defendant Abrahams, which includes a *Boston Magazine* article naming him as a "Turkey of the Year" for his "scams against those seeking scams" and illustrated by what appears to be a United States Marshal's Office mugshot of him, I am compelled to grant Abrahams' motion for change of venue because of prejudicial pretrial publicity. I find specifically that Abrahams has shown a likelihood of prejudicial publicity precluding a fair trial, *see United States v. Abrahams, supra,* 453 F. Supp. at 751, that there is an "incriminating nexus" between the pretrial publicity and the charges against Abrahams, *cf. Patriarca v. United States, supra* 402 F.2d at 317, that, contrary to the Government's assertion, the publicity has been so inflammatory and pervasive that its effect has not and will not be cured by a passage of time permissible under the Speedy Trial Act. *See*

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United States v. Abrahams, supra, 453 F. Supp. at 753-754. I am satisfied that there exists so great a prejudice against Abrahams that he cannot obtain a fair trial anywhere in this District. Fed. R. Crim. P. 21(a). *See* n. 12, *supra.*

The prejudicial publicity concerning Abrahams was not limited to this District. As Judge Caffrey noted, the major metropolitan newspapers in other parts of the Eastern United States have carried stories concerning Abrahams and his difficulties. *United States v. Abrahams, supra,* 453 F. Supp. at 754. Moreover, Abrahams, since Judge Caffrey's decision, has been tried on various charges in both Michigan and Texas. I note also that Lloyd, Carr had branch offices in Connecticut, Georgia, Pennsylvania, Michigan, Illinois, Missouri, Texas and California, and that its activities have been the subject of the CBS Television Network show "60 MINUTES," a video tape of which was viewed by the Court at the hearing on the venue motions in this case. In an effort to ensure a fair trial for Abrahams, and keeping in mind the locations of the activities of Lloyd, Carr and the prejudicial publicity, I have selected the District of Arizona, located at Phoenix, as a forum where he is likely to obtain a trial before untainted jurors.

With Abrahams severed from this case and venue of the charges against him transferred to Arizona, the venue motions of the remaining defendants are considerably weakened, and, in fact, counsel for a number of defendants have indicated that if Abrahams were severed and transferred, they would not press their venue motions at this time. Generally, but not without exception, the prejudicial publicity has focused upon Abrahams himself and to some extent upon Lloyd, Carr.[13] There has been little publicity concerning the individual remaining defendants themselves.

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13. I note that Judge Caffrey's decision relates only to Abrahams himself.

I am, however, concerned that the publicity in the Boston area, once the headquarters of Lloyd, Carr, and now the seat of legal activity concerning its operations, has been so consistent and pervasive that selection of a fair and impartial jury here would be quite difficult, even under the voir dire approach suggested by the Court of Appeals for the First Circuit in *Patriarca v. United States, supra,* 402 F.2d at 317-318. The Government has suggested the selection of a jury panel from Western Massachusetts as a possible solution and I agree.[14] Although "the Springfield Area is a major market for the two Boston dailies which contained much of the prejudicial material" regarding Abrahams himself, *United States v. Abrahams, supra,* 453 F. Supp. 754, I am convinced that the likelihood of juror taint is very low, at least in the more rural areas of Western Massachusetts, and in any case, is certainly lower than it is in Boston. Assuming a careful voir dire, there appears to be no reason why a fair and impartial jury could not be impanelled in Springfield. Federal Rule of Criminal Procedure 21(a), *see* n. 12, *supra,* itself favors trial in the district where prosecution is pending. Rule 21(a) provides for transfer of venue only where the defendant "cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." Trial of this case, except as to Abrahams, will therefore be held in Springfield.

The Motions to Dismiss

I treat the motions to dismiss as if filed by all defendants.[15]

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14. The Government's suggestion is that the jury panel itself be selected from Western Massachusetts and the trial be held in Boston. I believe undue hardship to the panel would result from such a solution. Selection of a panel from Western Massachusetts, however, with trial in Western Massachusetts appears to be viable.

15. Because, however, of my decision to sever Abrahams from the case and to grant his motion for change of venue, I do not rule on the motions to dismiss as they relate to him.

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The defendants' first group of contentions in support of dismissal relates to the proceedings of the grand jury. The defendants argue that dismissal is warranted because of selective prosecution, that the grand jury was biased because of prejudicial pre-indictment publicity, that there was misconduct on the part of the Assistant United States Attorney prosecuting the case, and that the grand jury was inadequately instructed on the relevant law. The selective prosecution claim is conclusory and unsupported by memorandum, affidavit or the record. The defendants are therefore not entitled to an evidentiary hearing on that claim. *United States v. Bourque*, 541 F.2d 290 at 292-293 (1st Cir. 1976). The defendants' claim that the grand jury was biased is not sufficient to justify a dismissal of the indictment.[16] "A presumption of regularity attaches to grand jury proceedings, *In re Lopreato*, 511 F.2d 1150, 1152 (1st Cir. 1975). . . .," *In re Inzirillo*, 542 F.2d 90 at 91 (1st Cir. 1976), and ". . . the fact alone of such publicity did not in itself constitute a sufficient showing of bias and prejudice." *Estes v. United States*, 335 F.2d 609 at 613 (5th Cir. 1964), *cert. denied*, 379 F.2d 964, *reh. denied*, 380 U.S. 926 (1965), citing *Beck v. Washington*, 369 U.S. 541 (1962). Similarly, the alleged "misconduct" of the Assistant United States Attorney, who apparently made certain comments to the grand jury, while perhaps not becoming of a Government attorney, was not of constitutional dimension, nor serious enough to warrant dismissal in the face of an abundance of evidence supporting indictment. *Cf. United States v. Riccobene*, 451 F.2d 586 (3rd Cir. 1971). Dismissal of an indictment is warranted only for ". . . such irregularities as infect the proceedings of the grand jury, or deprive the defendants of a fundamental right or violate the paramount policy of the United

16. I note that the defendants' claim in this regard was in the alternative. They sought either dismissal or the right to inspect the grand jury minutes based on their claim of particularized need. On November 7, 1978, the Magistrate to whom the pretrial motions in this case had been referred granted the latter remedy of inspection.

States . . ." *United States v. Kazonis*, 391 F. Supp. 804 at 805 (D. Mass. 1975), *affirmed* 530 F.2d 962 (1st Cir.), *cert. denied*, 429 U.S. 826 (1976). Finally, defendants claim that the grand jury was inadequately instructed is without merit.

By their next group of contentions, the defendants attack the indictment on its face. The defendants argue that dismissal is required because of duplicitous joinder of crimes, and defective and misleading allegation of the jurisdictional element of mailing, and that dismissal is required because exclusive jurisdiction for the crimes alleged in the indictment is provided for in Title 7 of the United States Code, 7 U.S.C. §1, *et seq.*

The defendants' duplicitous joinder argument is based on the incorporation in substantive counts of some of the paragraphs of the conspiracy count. The argument may be readily rejected. Incorporation by reference is permissible in criminal indictments. *E.g., United States v. Caldwell*, 544 F.2d 691 at 695 (4th Cir. 1976). The mere fact that some of the incorporated paragraphs begin with the phrase "[i]n furtherance of the conspiracy and scheme" does not render the substantive counts duplicitous. Only one offense, the substantive offense, is charged in each of those counts, and every count in the indictment charges a separate offense. *Cf. United States v. Bush*, 522 F.2d 641 at 649 (7th Cir. 1975), *cert. denied*, 424 U.S. 977, *reh. denied*, 425 U.S. 986 (1976).

The defendants' contention that the indictment defectively and in a misleading way alleges the jurisdictional element of mailing may also be rejected. The substantive counts of the indictment contain the phrase "did knowingly cause to be delivered by mail, according to the direction thereon, . . . " This phrase, which tracks the language of 18 U.S.C. §1341, the mail fraud statute, is a sufficient statement of jurisdiction. The indictment need not specifically refer to the United States Postal Service as opposed to some private postal system. *E.g., United States v. Constant*, 501 F.2d 1284 at 1287 (5th Cir. 1974), *cert. denied*, 420 U.S. 910 (1975).

District Court's Memorandum Opinion — December 29, 1978

The defendants' argument that dismissal is required because exclusive jurisdiction for the crimes alleged in the indictment is provided for in Title 7 of the United States Code is a clever one. The defendants rely on 7 U.S.C. §2, which vests the Commodities Futures Trading Commission ("CFTC") with "exclusive jurisdiction" with respect to transactions involving contracts for sale of a commodity for future delivery, and 7 U.S.C. §13(b), which prohibits, *inter alia,* the dissemination by mail or wire of ". . . false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . ." They argue that, read together, 7 U.S.C. §2 and 7 U.S.C. §13(b), because of the "exclusive jurisdiction" of the CFTC, bar prosecution for mail or wire fraud under 18 U.S.C. §§1341, 1343, where transactions involving the sale of commodities futures or options are involved.

Without yielding to the temptation to delve deeply into the interplay between the commodities fraud, securities fraud and mail and wire fraud statutes, I reject the defendants' argument. First, the Supreme Court has held that 15 U.S.C. §77q(a), the fraud provision of the Securities Act of 1933, does not repeal by implication the mail fraud statute. "The two," said *Edwards v. United States,* 312 U.S. 473 at 484 (1941) (footnote omitted). *See United States v. Tallant,* 547 F.2d 1291 at 1299 (5th Cir.), *cert. denied,* 434 U.S. 889 (1977). I believe that 7 U.S.C. §13(b) and 18 U.S.C. §§1341, 1343 can also exist together, "side by side." Second, the instant indictment charges the mailing and wiring, in furtherance of a scheme, of such things as purchase confirmations, checks, account cards and orders to purchase. Nowhere is it alleged that the defendants mailed or wired reports containing misleading crop or market information or conditions affecting commodity prices. The acts charged, therefore, do not appear to constitute violations of 7 U.S.C. §13(b). They do, however, constitute violations of 18

U.S.C. §§1341, 1343, which prohibit the use of the mails or wires in the execution of a scheme or artifice to defraud. *Cf. United States v. Maze*, 414 U.S. 395 (1974).

AN APPROPRIATE ORDER SHALL ISSUE.

s/ Frank H. Freedman
United States District Judge

DISTRICT COURT'S ORDER DATED JANUARY 15, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 78-327-F

UNITED STATES OF AMERICA

v.

JAMES A. BRIEN, JOHN J. COSULICH, THOMAS LABUS, ROBERT RALPH ZOLLA, MICHAEL SHUSTER, CURTIS BECK, IRA TODD KLEIN, FRANCIS R.H. NICHOLS, CHARLES ANDERSON WATHEN, FRANK POST and STEPHEN BUZZI

FREEDMAN, D.J.

The Court has before it defendant Brien's motion for reconsideration of the denial of his motion to dismiss. While the Court considers the arguments raised therein, as in the original motion itself, to be creative, the Court remains of the opinion that nothing in the commodities laws to any extent overrules the Mail Fraud Statute or makes the latter inapplicable to the instant case. The motion for reconsideration is therefore denied.

s/ Frank H. Freedman
United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED FEBRUARY 26, 1980

United States Court of Appeals

For the First Circuit

No. 79-1164

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES A. BRIEN,

DEFENDANT-APPELLANT.

No. 79-1165

UNITED STATES OF AMERICA,

APPELLEE,

v.

THOMAS LABUS,

DEFENDANT-APPELLANT.

No. 79-1166

UNITED STATES OF AMERICA,

APPELLEE,

v.

ROBERT RALPH ZOLLA,

DEFENDANT-APPELLANT.

No. 79-1167

UNITED STATES OF AMERICA,

APPELLEE,

v.

MICHAEL SHUSTER,

DEFENDANT-APPELLANT.

Opinion of the United States Court of Appeals for the First Circuit Dated February 26, 1980

No. 79-1168

UNITED STATES OF AMERICA,

APPELLEE,

v.

STEPHEN BUZZI,

DEFENDANT-APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

Before

CAMPBELL and BOWNES, *Circuit Judges*,

BONSAL,* *Senior District Judge.*

Daniel J. Kornstein for appellant, James D. Brien.

Barry M. Fallick, with whom *Platzer and Fallick* was on brief, for appellants, Thomas Labus and Michael Shuster.

Andrew Good, by appointment of the Court, for appellant, Robert Ralph Zolla.

Walter Munsen, with whom *Jessica deKoninck* and *de Koninck and Munsen* were on brief, for appellant, Stephen Buzzi.

Michael A. Collora, Assistant United States Attorney, with whom *Edward F. Harrington*, United States Attorney, was on brief, for appellee.

February 26, 1980

BOWNES, *Circuit Judge.* Defendants-appellants James Brien, Thomas Labus, Michael Shuster, and Robert Ralph Zolla, all former management employees of Lloyd, Carr & Company, appeal their convictions for conspiring[1] to

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* Of the Southern District of New York, sitting by designation.

[1] Conspiracy to violate federal law is prohibited by 18 U.S.C. § 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more

commit mail[2] and wire[3] fraud in the sale of futures contracts in commodities traded on markets in London, England. The appellants are joined by Stephen Buzzi, a former Lloyd, Carr & Company salesman, in appeals of convictions for the commission of mail and wire fraud in the sale of London commodity options. We affirm all convictions.

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than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[2] Use of mails in furtherance of any scheme to defraud is prohibited by 18 U.S.C. § 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3] Use of interstate wire communications in furtherance of any scheme to defraud is prohibited by 18 U.S.C. § 1343:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

There are five issues on appeal: (1) the validity of the search of a business premises and the seizure of business records; (2) whether the Commodities Futures Trading Act (CFTA) preempts or impliedly repeals the general mail and wire fraud statutes; (3) the correctness of the jury instructions; (4) a variance as to one count in the indictment; and (5) whether preindictment publicity was so prejudicial as to require dismissal of the indictment.

The Facts

Lloyd, Carr & Company (Lloyd, Carr) was founded in 1976 by Alan Abrahams, a/k/a James Carr, to sell London commodity options[4] to investors in the United States. Abrahams hired each of the defendants during 1976. All but Buzzi eventually assumed management positions with Lloyd, Carr. Thomas Labus, hired to head Lloyd, Carr's research department, also assumed responsibility for training new salesmen and served on Lloyd, Carr's Board of Directors. James Brien progressed from salesman to national sales manager and a member of the Board of Directors. Robert Ralph Zolla rose from salesman to sales floor supervisor of the Boston office, Lloyd, Carr's principal and largest office. Michael Shuster, originally hired as a salesman in Lloyd, Carr's Greenwich, Connecticut, office, became assistant manager of that office, and then manager of Lloyd, Carr's San Francisco office.

Lloyd, Carr sold commodity options through the use of

[4] The purchaser of a commodity option obtains the right to buy or sell a futures contract in a specific commodity at a fixed price for a fixed period of time. Purchase of the option is, in effect, a wager that the market value of the specified commodity will rise higher during the fixed option period than the fixed price of the option, thereby allowing the option holder to buy and sell the futures contract at a profit. For the holder to make a profit, the market price of the commodity must rise higher than the sum of the contract price, the option price (the premium) and any transactions costs, including brokerage commissions.

"boiler room"[5] sales operations. Salesmen, attracted to Lloyd, Carr by advertisements containing inflated estimates of their commissions and other benefits, were hired without regard to their knowledge of the commodities market. Once hired, salesmen were trained for a few days in telephone sales techniques and the subtleties of selling commodities options. They were then given a desk and a phone in a large room filled with other salesmen, and instructed to call persons whose names were obtained from Dun & Bradstreet investor lists. The prospects were called "cold" and exhorted to purchase commodity options from Lloyd, Carr. Lloyd, Carr salesmen were required to make at least one hundred calls per day, which resulted on the average in one or two sales. During one month, more than 155,000 long distance calls were made from Lloyd, Carr's Boston office. Sales commissions ranged from eight to fifteen percent of the option price. Turnover in salesmen was high.

To assist its salesmen, Lloyd, Carr provided them with scripts of "canned" sales pitches for the initial or "set up" call and follow-up calls. The purposes of the "set up" call were to "qualify" the investor by determining the extent of his interest and financial resources and to stimulate his interest in London commodity options. Interest was aroused by making false, deceptive and misleading statements about the likelihood of large increases in the price of particular commodities, about the actual cost of dealing in commodity options, and by misrepresenting important

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[5] A "boiler room" sales operation was concisely described in *S.E.C.* v. *R. J. Allen Associates, Inc.*, 386 F.Supp. 866, 874 (S.D. Fla. 1974):

> " Boiler room" activity consists essentially of offering to customers securities of certain issuers in large volume by means of an intensive selling campaign through numerous salesmen by telephone or direct mail, without regard to the suitability to the needs of the customer, in such a manner as to induce a hasty decision to buy the security being offered without disclosure of the material facts about the issuer.

facts concerning Lloyd, Carr's method of operations. Salesmen often claimed that Lloyd, Carr's market predictions were the product of a research department with a budget of one million dollars per year; in fact, a few part-time employees staffed the research department. Salesmen told investors that sales commissions were only ten to fifteen percent of the option price; in fact, while salesmen earned only that amount, Lloyd, Carr marked up the price of options in amounts ranging from seventy-two to five hundred percent of the market price and concealed that from investors. Salesmen informed investors orally and in writing that their funds would be placed in "customer segregated accounts" immune from attachment; in fact, no such accounts existed and Lloyd, Carr accounts were attached with increasing frequency as its legal difficulties mounted. Salesmen assured investors that options would be purchased on the day of the order; in fact, many options were not purchased until days or weeks after the order, thereby depriving investors of gains to be made in a rising market. Investors were frequently told that purchases had been made when they had not, and were denied the right to cancel orders on that basis. Although investors were told that their profits would be returned to them within forty-eight hours, many were forced to sue to obtain their profits.

Most importantly, Lloyd, Carr deceived investors as to how a profit could be made in commodity options. It repeatedly informed investors that they would realize a profit for every increase in the price of the commodity underlying the option. In fact, no profit could be realized until increases in the market price of the commodity also covered the cost of the purchase of the option. The cost of the purchase of the option included brokers' fees in addition to Lloyd, Carr's huge premiums. Lloyd, Carr often represented that its option prices were lower than its competitors; in fact, its enormous markups resulted in option

prices three or four times larger than those of its competitors. Finally, despite the fact that Lloyd, Carr's pricing mechanisms increased the risk of the purchase of a type of option already generally recognized as risky, Lloyd Carr told investors that commodity options presented only a limited investment risk.

After the "set up" call, salesmen sent investors a mailing containing various pamphlets and sales literature. This material included false, deceptive, and misleading statements similar to those made in the "set up" call. A steady barrage of follow-up calls to qualified investors followed the mailing, which continued the established pattern of false, deceptive, and misleading statements and injected a new component: high pressure salesmanship. In these calls, salesmen focused on the natural uncertainties of investors; the low risk, the huge return and Lloyd, Carr's record of success were emphasized in the context of the urgent need to invest immediately. Investors were also told that eighty-two percent of Lloyd, Carr's previous customers made money. In fact, nearly that percentage lost all of their investment. Often, when an investor hesitated, a second salesman was called to the phone to pose as an "expert" in the particular commodity and to corroborate the first salesman's claims.

Testimony at trial showed that this was the standard method of operation. The evidence also showed that the management of Lloyd, Carr intentionally created a pressurized "circus-like" atmosphere in which unusual and bizarre efforts to make sales became commonplace. Sales managers established quotas and fired those who failed to meet them. Prizes, including money, mopeds, and appliances were used to stimulate performance. Cash bonuses were paid to those who stood on their desks or removed their shoes, socks, ties, shirts or blouses while consummating a sale. Sales managers sometimes dressed in gorilla

suits or drove mopeds around the floor to energize the sales force. Sales were celebrated by the ringing of gongs and cowbells and by cheering from the sales force. Fear, too, played a role. Firings were frequent and capricious. During one slow sales period, the names of salespersons were placed on slips of paper in a hat. Persons whose names were drawn from the hat were fired on the spot.

It is not surprising that the investors lost heavily. By December of 1977, eleven hundred persons had purchased London commodity options through Lloyd, Carr.[6] Only thirty-three persons, three percent of all investors, made a profit on their investments. Approximately fourteen percent of all investors lost part of their investments. Eighty-three percent of Lloyd, Carr's investors lost everything.

State and federal legal action began in January of 1978. Several of those actions are relevant to this case. After receiving numerous complaints from persons solicited by Lloyd Carr, the Attorney General of the State of Michigan sought a preliminary injunction in state court. Lloyd, Carr removed the case to federal court and the Commodities Future Trading Commission (CFTC), the federal agency vested with exclusive jurisdiction over trading in commodity futures, intervened as a party plaintiff. On December 5, 1977, Chief Judge Noel Fox of the United States District Court for the Western District of Michigan granted the preliminary injunction, finding that Lloyd, Carr had committed "a number of egregious, inexcusable violations of federal law" and that it was engaged in "inherently fraudulent activity." *Kelley* v. *Carr*, 442 F. Supp. 376

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[6] Examples of the investment involved in commodity options purchased through Lloyd, Carr are as follows:

Commodity	*Unit of Sale*	*Option Price*
Sugar	50 metric tons	$11,000
Coffee	5 metric tons	14,000
Copper	25 metric tons	5,300

(W.D. Mich. 1978). This order enjoined Lloyd, Carr's fraudulent and deceitful activity, as well as the destruction or disposition of any "business related property."

Judge Fox further ordered compliance with Rule 32.7(e) of the CFTC, requiring production for inspection of records maintained pursuant to federal law. *See* 17 C.F.R. § 32.7(e) (1977).[7]

In the meantime, the Securities Division of the Office of the Secretary of State of Massachusetts had initiated its own investigation in response to more than one hundred seventy complaints received from persons solicited by Lloyd, Carr. On December 21, 1977, an employee of the Securities Division observed papers and materials being discarded from Lloyd, Carr's office at 84 State Street in Boston. The abandoned materials were confiscated and subsequently found to include records Lloyd, Carr was required to maintain by both CFTC Rule 32.7(e) and Judge Fox' order. The next morning, John M. Hurley, counsel for the Securities Division, served a subpoena duces tecum for a variety of business records on Lloyd, Carr and many of its employees.

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[7] 17 C.F.R. § 32.7 (1977) required, *inter alia*, the following:

(a) Each person which accepts any money, securities or property (or extends credit in lieu thereof) from an option customer as payment of the purchase price in connection with a commodity option transaction shall keep full, complete and systematic records together with all pertinent data and memoranda of or relating to such transactions. Such records shall at least include all orders (filled, unfilled or cancelled), signature cards, books of records, journals, ledgers, cancelled checks, copies of all statements of purchase, exercise or lapse, and reports, letters, disclosure statements and confirmation statements required by § 32.5 of this Part, solicitation or advertising material (including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations), circulars, memoranda, publications, writings, and all other literature or written advice distributed to option customers or prospective option customers.

Opinion of the United States Court of Appeals for the First Circuit Dated February 26, 1980

On January 9, 1978, Chief Judge Fox found probable cause to believe that several persons, including defendants Brien, Shuster, and Zolla, who worked at Lloyd, Carr's Boston office, had violated the injunction of December 5 and ordered them to show cause why they should not be held in criminal contempt. *United States* v. *Carr,* Crim. Cont. No. G78-2 C.A. (W.D. Mich. Jan. 9, 1978).

On January 10, 1978, a Lloyd, Carr investor informed Raymond Cocchi, Director of the Massachusetts Securities Division, that he had called Lloyd, Carr's Boston office and had been told that all account executives had been transferred to Atlanta, Georgia. Later that day, Hurley swore out an affidavit setting forth this and other relevant facts obtained during the Securities Division's investigation of Lloyd, Carr.

On Januray 11, 1978, Robert Boraks, Special Trial Counsel for the CFTC, swore out an affidavit detailing his knowledge of Lloyd, Carr's operations. Boraks' knowledge was obtained during the CFTC's intervention before Judge Fox, from interviews with Lloyd, Carr clients and employees, and from examination of CFTC files on Lloyd, Carr. The opinion and orders of Judge Fox in *Kelley* v. *Carr, supra,* and *United States* v. *Carr, supra,* were appended to Boraks' affidavit, as were several affidavits selected at random from those submitted to Judge Fox in *Kelley* v. *Carr.* The Boraks and Hurley affidavits were presented to the United States Magistrate as an Affidavit for Search Warrant later that day in Boston. The magistrate authorized a search and seizure of eight categories of Lloyd, Carr's books and records from its office at 84 State Street, Boston, including many of those required by federal law to be maintained. Execution of the warrant by F.B.I. agents resulted in the seizure of most of Lloyd, Carr's books and records and the curtailment of its Boston operations.

Opinion of the United States Court of Appeals for the First Circuit Dated February 26, 1980

I. *The Search Warrant*

A. *Appellants' Expectation of Privacy*

Brien, Labus and Zolla contend there was no probable cause for the issuance of the warrant and that it did not meet the particularity requirement of the fourth amendment.[8] The government denies this contention and questions the standing of Brien, Labus and Zolla to challenge the warrant.

The district court found that Brien and Zolla "definitely" had standing and that Labus also had standing, although his standing was "borderline." We find no error in this determination.

In *Rakas* v. *Illinois*, 439 U.S. 128, 140 (1978), the Supreme Court reduced the issue of "standing" to one essential question: did the persons asserting a fourth amendment claim have a legitimate expectation of privacy in the areas searched. The concurring opinion of Mr. Justice Powell, also entered into by Chief Justice Burger, suggests a variety of factors for consideration in answering this question. Were the persons asserting the claim legitimately on the premises? Did the persons take the customary precautions to protect their privacy? Had the persons used the location in a way which implied a subjective expectation of privacy? Is the asserted expectation of privacy consistent with the historical notions of privacy held by the Framers of the fourth amendment? Did the persons possess conventional property rights in the area searched? *Rakas* v. *Illinois*, 439 U.S. at 150-53 (Powell, J., concurring).

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[8] The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., amend. IV.

The district court requested that argument on standing focus on six factors: "(1) his [each defendant's] position in the firm; (2) did he have any ownership interest; (3) his responsibilities; (4) his power to exclude others from the area, if any; (5) did he work in the area; (6) was he present at the time of the search." The district court properly adapted the *Rakas* guidelines to this case.[9]

B. *Probable Cause*

The search warrant authorized the seizure of the following items:

> Lloyd, Carr's bank statements, cash receipt books, option purchase records, sales material distributed to customers, employee compensation records, customer account records, sales training material and customer lists.

These materials constituted most of the business records of Lloyd, Carr.

Only Zolla fully briefed the search warrant issues on appeal. Buzzi waived the issues entirely, while Labus, Shuster and Brien incorporated Zolla's arguments pursuant to Federal Rule of Appellate Procedure 28(i). Although Zolla's summary of argument challenges the search warrant on the grounds of lack of particular descriptions of the things to be seized as well as lack of probable cause for its issuance, his brief focuses entirely on the alleged

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[9] It also considered other factors relevant to whether there existed a societal expectation of privacy under these circumstances. The district court was aware that, unlike normal business offices, Lloyd, Carr's Boston office was a citadel of security. In part to protect salesmen from angry customers, the door to the sales floor and management offices was locked form the inside. Business records, other than the daily working papers of salesmen, were either locked in file cabinets or kept in separate rooms to which only a few persons, including appellants, had access. The evidence before the district court established that Lloyd, Carr went to great lengths to keep its methods of operation secret.

lack of probable cause for a warrant authorizing the seizure of all of the papers in each of the categories of business records enumerated in the search warrant.[10]

The question to be decided is: what must be shown to establish probable cause that most or all of the business records of a company are linked to a mail and wire fraud scheme.

As the Supreme Court has emphasized:

> In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical con-

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[10] One of the appellants contends:

> This appeal is concerned not so much with any danger that the officers executing the warrant seized documents upon the mistaken assumption that they fell within the magistrate's descriptions of the things to be seized. *United States* v. *Klein*, 565 F.2d 183 (1st Cir. 1977). Rather, the claim here is that the descriptions, though relatively clear, are far broader than can be justified by the information set forth in the search warrant application. *Montilla Records of Puerto Rico, Inc.* v. *Morales*, 575 F.2d 324 (1st Cir. 1978). [Brief of Robert Ralph Zolla at 10.]

Appellants are thus taking a position alluded to in *Lafayette Academy*, No. 79-1123 (1st Cir. October 29, 1979), slip op. at 8, to the effect that the warrant clearly describes the items to be seized, but that such a widespread seizure exceeds the underlying probable cause appearing in the affidavit. We agree that the executing officers were sufficiently instructed as to what to take and that this, therefore, is not a case resembling *United States* v. *Klein*, 565 F.2d 183 (1st Cir. 1977), where the warrant descriptions of what to seize left too much to the discretion of the officers. But we do not agree that the underlying probable cause, as shown in the affidavit, was insufficient to justify seizure of all the materials listed in the warrant. As we explain in this opinion, the fraud was so extensive as to justify a belief by the magistrate that all these documents were likely to constitute evidence of the crimes under investigation. The present situation contrasts sharply with that in *Lafayette* where seizure of *all* records could not have been justified even assuming a well-drawn warrant to that effect. The defendant's business in *Lafayette* was apparently legitimate, and as the suspected criminal activity went to only one aspect of it, only certain files, relating to that aspect, could be authorized for seizure.

> siderations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

Brinegar v. *United States,* 338 U.S. 160, 175 (1949). *See also United States* v. *Zurosky,* No. 79-1088, slip op. at 9 n. 2 (1st Cir. December 28, 1979).

In this case, the affidavit indicated that the government sought the warrant in an effort to prove the existence of "a scheme and artifice to defraud and a scheme to obtain names by false and fraudulent pretenses and promises by the use of the United States mails and through transmission of signs and sounds in interstate commerce, in violation of 18 U.S.C. 1341 and 1343." To prove violations of sections 1341 and 1343 of title 18, the government had to show the existence of "(1) a scheme conceived . . . for the purpose of defrauding . . . by means of false pretenses, representations or promises and (2) use of the United States mails [or interstate wire communications] in furtherance of the scheme." *Gold* v. *United States,* 350 F.2d 953, 956 (8th Cir. 1965); *see United States* v. *Cady,* 567 F.2d 771 (8th Cir. 1977), *cert. denied,* 435 U.S. 944 (1978); *United States* v. *Reid,* 533 F.2d 1255 (D.C. Cir. 1976); *New England Enterprises, Inc.* v. *United States,* 400 F.2d 58, 72 (1st Cir. 1968), *cert. denied,* 393 U.S. 1036 (1969). The essence of a scheme is a plan to deceive persons as to the substantial identity of the things they are to receive in exchange. *Harrison* v. *United States,* 200 F. 662 (6th Cir. 1912). A pattern of deceptive conduct may show the existence of a plan, scheme or artifice. *See generally United States* v. *Nance,* 502 F.2d 615, 618 (8th Cir. 1974), *cert. denied,* 420 U.S. 926 (1975); *United States* v. *Seasholtz,* 435 F.2d 4, 8 (8th Cir. 1970). Accordingly, if the magistrate had probable cause to believe that Lloyd, Carr used the mails and interstate wire communications in further-

ance of a scheme to defraud, a valid warrant could issue authorizing the seizure of all materials the magistrate had probable cause to believe were evidence of that scheme.

We reject Zolla's argument that, at most, the government had probable cause to seize Lloyd, Carr's records pertaining to transactions involving the two hundred fifty persons who complained about Lloyd, Carr to various regulatory authorities. As noted, the mail and wire fraud statutes focus on the scheme, not on the implementation of it. The two hundred fifty complaints were relevant to the probability that other Lloyd, Carr customers were treated similarly, as well as to whether actual fraud was committed upon the complainants. Since a scheme involves "some connotation of planning and pattern," *Fabian* v. *United States,* 358 F.2d 187, 193 (8th Cir.), *cert. denied,* 385 U.S. 821 (1966); *United States* v. *Ross,* 321 F.2d 61, 68 (2d Cir.), *cert. denied,* 375 U.S. 894 (1963), it follows that evidence of planning and pattern may show the existence of a scheme. *See generally United States* v. *Nance,* 502 F.2d 615. We think it could be fairly inferred from similarities in sales techniques and business practices reported by the two hundred fifty complainants, the information obtained from former Lloyd, Carr employees interviewed by investigators and other information gained by investigators that it was more likely than not that Lloyd, Carr was using similar, if not identical, fraudulent, deceptive and misleading sales techniques and business practices with most of its customers. The two hundred fifty complaints that surfaced could fairly be inferred to be only the tip of the iceberg.

After reviewing the materials contained in the affidavit, we conclude that the facts presented to the magistrate warranted a strong belief that Lloyd, Carr's operation was, solely and entirely, a scheme to defraud by use of the mails and interstate telephone calls.

The affidavit contained three items of significant probative value: the affidavit of Robert Boraks, Special Trial Counsel to the Commodity Futures Trading Commission; the affidavit of John M. Hurley, attorney for the Securities Division of the Office of Secretary of State of the Commonwealth of Massachusetts; and copies of the orders and supporting opinion of Chief Judge Fox in *Kelley* v. *Carr*, 442 F. Supp. 346 (N.D. Mich. 1977), and *United States* v. *Carr*, Crim. Cont. No. G78-2 C.A. (N.D. Mich. January 9, 1978). Borak's affidavit stated that, on the basis of his analysis of the complaints of seventy-five Lloyd, Carr customers, interviews with twenty former Lloyd, Carr employees and his review of CFTC files on Lloyd, Carr, he believed that it was running a "boilershop" sales operation. Boraks, who had been involved in *Kelley* v. *Carr* and *United States* v. *Carr*, described Lloyd, Carr's organization, sales techniques and business practices in detail in his affidavit, concluding that "[t]he sales program . . . includes patterns of representations which are false, representations which are ambiguous in a way calculated to mislead, representations for which there is no reasonable basis designed to lure the prospect to purchase, and purposeful omissions of material facts." In light of Boraks' familiarity with Lloyd, Carr, the facts he asserted were entitled to great weight in the magistrate's determination that Lloyd, Carr was engaged in a general scheme to defraud.

Boraks also stated that he had seen numerous documents reflecting Lloyd, Carr's operations, including telephone scripts, sales literature, sales quota sheets, confirmations mailed to customers, and lead cards used to provide salesmen with prospects. In addition, Boraks averred that he knew that Loyd, Carr was required by federal regulation to maintain records of all orders, signature cards, books of record, journals, ledgers, cancelled checks, copies of all

statements or tapes of purchase exercises, solicitation or advertising material and circulars, memoranda and writings distributed to option customers. This provided the magistrate with a specific description of the universe of records which might be likely to contain evidence of the scheme to defraud.

Hurley's affidavit stated that his office had investigated Lloyd, Carr because it had received more than one hundred seventy complaints from persons solicited. Hurley's summary of the similarities of those complaints painted a picture of fraud, misrepresentation and deceit nearly identical to that described by Boraks. In addition, Hurley described the physical layout of the Boston office of Lloyd, Carr. Like Boraks, Hurley stated his belief that Lloyd, Carr was using the mails and interstate telephone calls to conduct its business, and stated the facts on which that belief was based. The facts sworn to by Hurley corroborated those sworn to by Boraks and provided substantial justification for the inference that the sales techniques and business practices reported by the complainants were being used with all Lloyd, Carr customers. Most importantly, Hurley's affidavit informed the magistrate that Lloyd, Carr was disposing of records contrary to federal regulation and Judge Fox' order and that there was evidence that Lloyd, Carr was closing down its Boston office.

Judge Fox' orders and opinions added great weight to the affidavit. The opinion in *Kelley* v. *Carr* corroborated the existence of a scheme to defraud implemented by the mails and telephone. The contempt order emphasized the lawlessness of the operation, particularly that portion conducted from the Boston office.

We also conclude from our review of the affidavit facts that they warranted a finding of probable cause that the material, books and records enumerated in the search warrant were evidence of or contained evidence of the existence

of a scheme to defraud at Lloyd, Carr's Boston office. The affidavit described in detail the records Lloyd, Carr maintained voluntarily and in response to federal regulation and Judge Fox' order. The descriptions of Lloyd, Carr's sales techniques and business practices permitted a relatively accurate determination of what records would be relevant to mail and wire fraud. The bank statements and cash receipt books would show the amounts of salesmen's commissions, whether option monies actually were segregated and whether customers actually were receiving their money back. Sales materials probably would contain evidence of representations made to customers through the mails. The option purchase journal would reveal names of customers and the details of their purchases. Employee compensation records were relevant to representations made to customers concerning commissions and to the problem of defining management responsibilities. The customer lists and customer account records were relevant to determination of customer profits and losses in the market and, therefore, bore on the truthfulness of Lloyd, Carr's representations concerning customer profits. The sales training materials were relevant to the determination of whether the sales techniques complained of were aberrations or the general practice.[11]

We hold that where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of an enterprise may be seized, if they are, as here,

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[11] This was not a case in which the suspected crime may have been reflected in a segregable class of records. *Cf. In Re Lafayette Academy;* No. 79-1123 (1st Cir. October 19, 1979) (Federal Insured Student Loan Program-related records); *VonderAHE v. Howland*, 508 F.2d 364 (9th Cir. 1974) (yellow sheets and green cards maintained by dentist as records for patients whose payments were not reported as income to the IRS). Rather, the affidavit showed that Lloyd, Carr was engaged in the very specialized business of selling London commodity options and that its entire operation was a scheme to defraud investors.

accurately described so that the executing officers have no need to exercise their own judgment as to what should be seized.

II. *Preemption and Implied Repeal*

We deal next with the contention that appellants' convictions should be set aside because the general mail and wire fraud statutes under which the convictions were obtained were either preempted or impliedly repealed by the enactment of the more specific antifraud provisions of the Commodities Futures Trading Act.[12]

Appellants' argument rests primarily on the exclusive jurisdiction provisions of Section 2(a)(1) of the CFTA:

> *Provided,* That the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty" or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title[.]

17 U.S.C. § 2 (1978).

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[12] Fraud in the sale of trading of commodities futures is prohibited by 7 U.S.C. § 6O:

> (1) It shall be unlawful for any commodity trading advisor or commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (A) to employ any devise, scheme, or artifice to defraud any client or participant or prospective client or participant; or
>
> (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or participant or prospective client or participant.

They also point to supporting language in the Conference Report on the 1974 Amendments to the CFTA. *See* H. Conf. Rep. No. 93-1383, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843.

Although we agree that Congress intended the CFTC to occupy the entire field of commodities futures regulation, we see two reasons why that conclusion is of little help to appellants.

Assuming, *arguendo,* that appellants' acts violated both 7 U.S.C. § 60 and 18 U.S.C. §§ 1341 or 1343,[13] we find no basis for a conclusion that the former either preempted or impliedly repealed the latter. It was the fraudulent scheme furthered by use of the mails and interstate telephone calls that brought appellants within the purview of the mail and wire fraud statutes and not the sale of commodity options. While courts have held that the CFTA preempts state regulation of commodities futures, *Clayton Brokerage Co. of St. Louis, Inc.* v. *Mouer,* 520 S.W.2d 802 (Tex. Civ. App. 1975), it has also been held that the CFTA does not preempt state general antifraud statutes. *People of New York* v. *Monex Int'l, Ltd.,* 86 Misc.2d 320, 380 N.Y.S.2d 504 (1976). By the same analysis, since 18 U.S.C. §§ 1341 and 1343 are federal general antifraud statutes, they cannot be preempted by the CFTA.

Moreover, in urging a finding of implied repeal, appellants march into the teeth of a strong judicial policy disfavoring the implied repeal of statutes. *See United*

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[13] The district court found, *inter alia,* that the actions of appellants did "not appear to constitute violations of 7 U.S.C. § 13b" because the government never alleged that appellants "mailed or wired reports containing misleading crop or market information or conditions affecting commodity prices" as prohibited by section 13b. The district court failed, however, to consider whether the acts violated 7 U.S.C. § 60, the more pertinent provision of the CFTA. *See* note 12, supra. In light of our other conclusions in regard to the issues of preemption and implied repeal, we find this to be harmless error. Fed.R.Crim.P. 52(a).

States v. *Borden,* 308 U.S. 188, 198 (1939). For a court to find implied repeal, there must be a positive repugnancy between the two statutes. *Posados* v. *National City Bank,* 296 U.S. 497, 504 (1936); *Wood* v. *United States,* 41 U.S. (16 Peters) 341, 362-63 (1842). Where two statutes cover the same subject, effect will be given to both, if possible. *Posados* v. *United States, supra.* Partial repeals will not be implied because they do not satisfy the requirement that the intent of the legislative body be clear and unequivocal. *Id.* It is also generally held that for a later-enacted statute to impliedly repeal an earlier one, the later statute must cover the entire field occupied by the earlier one. *United States* v. *Tynen,* 78 U.S. (11 Wall.) 88 (1870); *United States* v. *Montgomery,* 21 F. Supp. 770, 771 (D.N.M. 1938). The CFTA, which prohibits only interstate communications in commodities fraud, obviously does not cover the entire ground occupied by 18 U.S.C. §§ 1341 and 1343, which apply to mail or interstate wire communications in furtherance of *any* scheme to defraud. There can be no finding of implied repeal in these circumstances. *Cf. Edwards* v. *United States,* 312 U.S. 473, 484 (1941) (the Securities Act does not operate as an implied repeal of the mail fraud statutes); *Smith* v. *Groover,* 468 F. Supp. 105 (N.D. Ill. 1979) (CFTA does not impliedly repeal the federal antitrust laws); *R. J. Herely & Son Co.* v. *Stotler & Co.,* 466 F. Supp. 345 (N.D. Ill. 1979) (congressional grant of exclusive jurisdiction to the CFTC was not intended to eliminate existing private remedies).

Although the statutes prohibit similar conduct, they operate independently and harmoniously. The government's election to prosecute appellants under the statute which, at the time, provided the more severe penalty,[14]

[14] At the time of appellants' indictment, Section 13(c) of the CFTA made violation of Section 6O of the CFTA punishable by a fine of up to $100,000 and/or imprisonment of not more than one

was an exercise of discretion that violated no rights of appellants. *United States* v. *Batchelder,* 47 U.S.L.W. 4611, 4614 (June 4, 1979).

III. *The Jury Instructions*

Appellants Buzzi and Zolla challenge several aspects of the district court's instructions to the jury.

Zolla challenges the district court's inclusion in the jury instruction of two allegedly conflicting definitions of the term "scheme or artifice" as that term is used in 18 U.S.C. §§ 1341 and 1343. At one point in the instructions, the district court articulated this partial definition:

> The scheme need not be fraudulent upon its face, and need not misrepresent any fact, because all that is necessary is that it be a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension, and that the mail service of the United States be used in the execution of the scheme.

Later in the charge, the court used a more expansive definition:

> It is immaterial whether only the most gullible would have been deceived by the techniques involved. Section 1341 protects the naive as well as the worldly-wise, and the former are more in need of protection than the latter.

In response to Zolla's timely objection, the court stated, "I don't believe they are inconsistent."

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year. The general mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, respectively, provide a punishment of a fine or not more than $1,000 or imprisonment of not more than five years. The federal conspiracy statute carries a maximum penalty of a fine of no more than $10,000 and/or imprisonment of not more than five years. 18 U.S.C. § 371. In 1978, Congress increased conviction for mail and wire fraud in connection with commodities trading to a felony punishable by a fine of not more than $500,000 and/or imprisonment of not more than five years, together with the costs of prosecution. *See* The Futures Trading Act of 1978, Pub.L. 95-405.

Zolla acknowledges that several circuits have adopted the "most gullible" instruction, *see, e.g., Lemon* v. *United States,* 278 F.2d 369, 373 (9th Cir. 1960); *United States* v. *Sylvanus,* 192 F.2d 96, 105 (7th Cir. 1951), *cert. denied,* 342 U.S. 943 (1952); *Bogy* v. *United States,* 96 F.2d 734, 741 (6th Cir.), *cert. denied,* 305 U.S. 608 (1938), but argues that the more prevalent and correct standard is the "ordinary prudence and comprehension" standard, *see, e.g., United States* v. *Netterville,* 553 F.2d 903 (5th Cir.), *cert. denied,* 434 U.S. 861 (1977); *United States* v. *Beitscher,* 467 F.2d 269 (10th Cir. 1972); *United States* v. *Seasholtz,* 435 F.2d 4 (8th Cir. 1970). We disagree. If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright. These are criminal statutes, not tort concepts. The only issue is whether there is a plan, scheme or artifice intended to defraud. We discern no intention on the part of Congress to differentiate between schemes that will ensnare the ordinary prudent investor and those that attract only those with lesser mental acuity. The inconsistency, if any, in the instruction could only have helped the appellants, and it is, therefore, harmless error. Fed.R.Crim.P. 52(a).

Zolla and Buzzi challenge the failure of the district court to instruct the jury that mailings which alert the victim to the existence of improprieties cannot form the basis of a mail fraud conviction. We note first that there was no evidence that the mailings sent by appellants were intended to inform the recipients of improprieties. *See New England Enterprises, Inc.* v. *United States,* 400 F.2d 58, 71 (1st Cir. 1968), *cert. denied,* 393 U.S. 1036 (1969). However, even if this obstacle were overcome, the record shows that the district court gave a form of the requested instructions:

> **If you find that the particular mailing was not sent with the intent to carry out an essential step in a scheme to do fraud, then you must reach a not guilty verdict as to that mailing. . . . In order to reach a guilty verdict as to any particular mailing alleged in the indictment, you must find beyond a reasonable doubt that the mailed article in question was sent with the intent to carry out an essential step in the alleged scheme to defraud.**

As a whole, the charge fairly and accurately stated the law, and must be upheld. *See Johnson* v. *Rederi,* No. 79-1118, slip op. at 30 (1st Cir. Jan. 11, 1980).

Buzzi further contends it was error for the district court to instruct the jury that conscious avoidance of knowledge of whether one's statements are false and misleading is knowing action. He argues that the mail fraud statute requires a finding of specific intent to deceive to sustain a conviction, and that the district court's instruction allowed him to be found guilty under a less stringent standard. We find no error in the use of a "conscious avoidance" instruction in concert with a specific intent instruction. Since we equate the term "conscious avoidance" with a specific intent to avoid knowing whether one's statements are false and misleading, conscious avoidance is merely a subset of specific intent. This is a more stringent standard than the "wilful recklessness" standard proposed by Buzzi in his brief, which might also be characterized as conscious carelessness. The "conscious avoidance" standard implies a specific intent to avoid the proscription of the law by not determining the accuracy of one's statements. If, by such conduct, one participates in a scheme to defraud, that person is as guilty of violating the mail fraud statutes as a person who is conscious of the nature of his statements. *See generally United States* v. *Hanlon,* 548 F.2d 1096, 1101 (2d Cir. 1977); *United*

States v. *Natelli*, 527 F.2d 311, 322 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Bentel* v. *United States*, 13 F.2d 327 (2d Cir.), *cert. denied sub nom. Amos* v. *United States*, 273 U.S. 713 (1926).

IV. *The Count Thirty-Two Variance*

Buzzi also alleges his conviction on Count Thirty-Two was improper because it alleged the mailing of a sugar option while the proof at trial pertained to a copper option. We find little merit in Buzzi's argument. Although the indictment did pertain to a sugar option, Buzzi was provided with copies of testimony and evidence presented to the grand jury, including receipts and the option purchase journal, which showed the details of the purchase. Despite this information, Buzzi failed to inform the district court of the defect in the indictment prior to trial, as required by Fed.R.Crim.P. 12(b)(2).[15] We may grant relief from this failure by Buzzi, Fed.R.Crim.P. 12(f),[16] but not unless we find that substantial rights are affected. Fed.R.Crim.P.

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[15] Fed.R.Crim.P. 12(b) provides:

(b) *Pretrial Motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

. . . .

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings)[.]

[16] Fed.R.Crim.P. 12(f) provides:

(f) *Effect of Failure to Raise Defenses or Objections.* Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extention thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

52(b).[17] The test of substantiality is provided by *Berger* v. *United States*, 295 U.S. 78, 82 (1935):

> The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

There can be no question that Buzzi was aware of the charges against him. The only possible cause for confusion was the incorrect name given to the option Buzzi sold to Cappozzi; all other facts of the sale were correct. There is no allegation that Buzzi was uncertain as to the sale for which he was being prosecuted. Moreover, we find no possibility that the variance could have subjected Buzzi to double jeopardy. The variance was not fatal. *See United States* v. *Quicksey*, 525 F.2d 337, 341 (4th Cir. 1975), *cert. denied*, 431 U.S. 931 (1976).

V. *Prejudicial Preindictment Publicity*

Buzzi's final challenge focuses on the allegedly prejudicial effect on the grand jury of publicity concerning Lloyd, Carr in the Boston area. Buzzi argues that the publication of derogatory information about Lloyd, Carr prior to and during the grand jury's deliberations was so pervasive that the district court erred in denying his motion to dismiss the indictment.

It is true that the sensational activities of Lloyd, Carr precipitated extensive critical comment in the press in

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[17] Fed.R.Crim.P. 52(b) provides:

> (b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

New England and the Eastern seaboard. Because of the possible effect of that publicity on the defendants' right to a fair trial, venue was transferred to Springfield, Massachusetts, and the trial of Alan Abrahams, a/k/a James Carr, the President of Lloyd, Carr, was severed from appellants' and transferred to Arizona. In effect, Buzzi contends that publicity so intense as to require a change of venue must have prejudiced the grand jury.

The rule in this circuit is that an indictment will not be dismissed on the grounds of prejudicial preindictment publicity unless it can be shown that the jury failed in its sworn duty to act with impartiality. *Gorin* v. *United States,* 313 F.2d 641, 645 (1st Cir. 1963), *cert. denied,* 379 U.S. 971 (1965). *Gorin* was decided prior to the adoption of the "inherently prejudicial" standard of *Sheppard* v. *Maxwell,* 384 U.S. 333, 352-55 (1966). *Sheppard* establishes that, in some circumstances, publicity concerning a case may be so extensive and intense that no inquiry need be made as to the actual effect of the publicity on the petit jury. Prejudice is assumed; it need not be established. If prejudice is assumed as to petit juries, it may also be assumed as to grand juries. However, it does not follow that the remedy for possible exposure to inherently prejudicial publicity should be the same for grand juries as for petit juries. The different treatment of grand and petit juries which may have been exposed to inherently prejudicial publicity is premised, of course, on the theory that the taint of a grand jury will be purged by the deliberations of an untainted petit jury. As noted in *Silverthorne* v. *United States,* 400 F.2d 627, 634 (9th Cir. 1968), *cert. denied,* 400 U.S. 1022 (1971),

> the grand jury deliberates and indicts, as an accusing body, on the standard of "reasonable probability" that a crime has been committed by some person. It is not a trial body. United States v. Atlantic Comm'n

> Co., 45 F.Supp. 187, 192 (E.D.N.C. 1942). The quantum of evidence necessary to indict is not as great as that necessary to convict. If a grand jury is prejudiced by outside sources when in fact there is insufficient evidence to indict, the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence. And, if impartiality among the petit jurors is wanting, the cure is reversal by the appellate courts.

Since there is no contention here of a publicity prejudiced petit jury, we need proceed no further.

Affirmed